88 Transit Lines, Inc. *and* Teamsters Local Union No. 872, a/w International Brotherhood of Teamsters, AFL–CIO.¹ Cases 6–CA–20490, 6– CA–20984, and 6–CA–21380

July 12, 1994

## SUPPLEMENTAL DECISION AND ORDER

# BY CHAIRMAN GOULD AND MEMBERS DEVANEY AND BROWNING

On June 25, 1993, Administrative Law Judge Harold Bernard Jr. issued the attached supplemental decision. The General Counsel filed exceptions, a supporting brief, and an answering brief. The Respondent filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

The General Counsel excepts to the judge's supplemental decision, contending that the judge erred (1) in denying backpay to the replacement drivers and (2) in not granting backpay to all of the original drivers for each of the weeks that they were employed during the backpay period. For the following reasons, we agree with the General Counsel.

## Background

## A. The Underlying Unfair Labor Practice

As fully discussed in the Board's underlying Decision and Order,<sup>2</sup> shortly after a representation election was conducted at the Respondent's facility, the Respondent announced to its employees that its transitrun schedule would be changed, that is, that schedule B, which had been in effect for many years, would be replaced by schedule C. That change in the transitrun schedule was made effective November 28, 1987.

Prior to the change, the schedule provided for 15 fixed runs that were bid on by the drivers every 4 months. These bids were awarded in order of seniority. After the change, the total number of fixed runs decreased by one, and only eight of those remaining fixed runs were open for bids. Under schedule C, the fixed runs not open for bids were assigned by the Respondent, at its discretion, on a daily basis.

The Board found that the scheduling change was unlawfully made and directed the Respondent to "make whole its employees for any loss of earnings and other benefits they may have incurred" as a result of the Respondent's unlawful schedule change.

On June 14, 1991, the United States Court of Appeals for the Third Circuit entered a judgment enforcing the Board's Order. Because a controversy arose over the amount of backpay due the discriminatees under the terms of the Board's Order and the court's judgment, on September 16, 1992, the Regional Director issued a backpay specification and notice of hearing. Following a January 21, 1993 hearing, the judge issued a supplemental decision. In his decision, the judge amended the backpay specification and only ordered the Respondent to pay a portion of the backpay requested therein.

## B. The Backpay Specification

Under the Regional Director's specification, the backpay period began on November 29, 1987, when the Respondent implemented schedule C and ended on August 18, 1991, when the Respondent reinstituted schedule B. The backpay period consisted of 194 weeks. Under the specification, as a result of the Respondent's implementation of schedule C, the employees in the bargaining unit, as a group, lost 2-3/4 hours of work each day of every week in the backpay period, or a total of 13.75 hours each week of the backpay period. The wage rate for the discriminatees for the entire backpay period was \$6.75 per hour. Backpay is sought for 23 discriminatees who worked for the Respondent as full-time and regular part-time drivers, and any replacement drivers hired during the backpay period.<sup>3</sup> The specification sets forth the names of the discriminatees and the number of weeks each discriminatee actually worked during the backpay pe-Applying this backpay formula, discriminatee lost \$4.04 per week for each week worked during the backpay period.

# C. The Judge's Decision

At the outset of the hearing, the parties stipulated to the following:

During the backpay period and as a result of Respondent's implementation of the change in drivers' schedules to Schedule C, the bargaining unit employees as a group were scheduled for two-and-three quarter hours less of scheduled route work per week day than before the change totaling 13 and 3/4 hours for each week of the backpay period. These same employees, however, on

<sup>&</sup>lt;sup>1</sup> On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

<sup>&</sup>lt;sup>2</sup> 300 NLRB 177 (1990), enfd. mem. 937 F.2d 598 (3d Cir. 1991).

<sup>&</sup>lt;sup>3</sup>At the hearing, it was determined that 14 drivers were hired during the course of the backpay period. These individuals are referred to as "replacements" in the backpay specification. The total number of drivers at any one time never exceeded 23.

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an individual basis, did not necessarily experience lower gross earnings either annually or quarterly, and indeed many employees had higher gross earnings after the change to Schedule C than before the change was made. Gross earnings, as used in this stipulation includes earnings from scheduled routes as well as charter runs.

Although the judge accepted the parties' stipulation and found that the theory supporting the specification was valid, he concluded it was necessary to amend the specification.

The judge found that the 14 replacement employees should be excluded from consideration for backpay because they were not employed at the time that the schedule was changed. The judge reasoned that the replacement drivers did not have any losses to be restored to them because they were not employed at the time the Respondent unlawfully changed its schedule.

As to the original 23 employees, the judge found that the General Counsel's formula was in error because it failed to take into account what the judge deemed interim earnings of these employees during the backpay period. In particular, the judge noted that the records showed that the earnings of these employees for specified years of the backpay period exceeded the wage totals of the base period year, i.e., the year immediately preceding the unfair labor practice. The General Counsel had argued that the greater earnings were attributable to work analogous to extra overtime and that compensation for such work is normally not considered as part of interim earnings under long-established Board compliance policies. The judge rejected this argument because he viewed the Respondent's operations both before and after the unlawful schedule change as providing "an amorphous, everchanging mix or environment of opportunities for work" and saw no significant differences between patterns of overtime before or after the commission of the unfair labor practices. Hence, he concluded that "[w]hen any post-unfair labor practice year's total wages equal or exceed the base period year," he would deem these to be interim earnings that "mitigated any gross back pay for such year," and he accordingly deducted from gross backpay "an amount equal to General Counsel's formula figure of \$4.04 per week times the number of weeks in the work year as set forth in the original formula."

## Analysis

## A. Replacement Driver Issue

We find that the judge improperly excluded the 14 replacement drivers from consideration for backpay. The Respondent's actions were directed against the bargaining unit as a whole. The change in schedule was designed to cause a loss of work and, in fact, re-

sulted in all employees in the unit losing the opportunity to bid on run 14. As replacement employees became part of the unit, they suffered the same disadvantage of not being able to bid on this work as did the other unit employees. Since the action was directed against the unit, the proper remedy requires that the unit, including the replacement drivers, must be made whole for any loss of earnings that resulted from the Respondent's unlawful conduct. Any other course would mean that the bargaining unit would not be made whole for the Respondent's unlawful actions.<sup>4</sup>

## B. Interim Earnings Issue

We disagree with the judge's decision to treat as interim earnings any amount by which the discriminatees' post-unfair labor practice annual earnings exceeded their base-period year earnings with the Respondent. We reject that decision because it is an inappropriate application of the interim earnings' concept to a case involving a violation other than discharge from employment, and because it effectively resolves uncertainties in favor of the wrongdoer.

Interim earnings are earnings from employment that is a substitute for employment taken away as a result of unlawful conduct. Affected employees obtain such employment in accordance with their obligation to mitigate their damages. The backpay ultimately owed a discriminatee is determined by subtracting the interim earnings from his or her gross backpay-i.e., "What the discriminatee would have earned from employment had there been no unlawful action."5 That substitution concept, however, makes sense only with respect to employees who have been unlawfully discharged. The employees here were not discharged but were simply the victims of an unlawful schedule change; neither the judge nor any party contends that they were required, as part of any mitigation obligation, to obtain additional replacement work from some other employer during the backpay period. In his resolution of the interim earnings issue, however, the judge treated any instance of annual earnings in excess of base-period annual earnings as if they were attributable to work that was a substitute for work that was taken away as a result of the Respondent's unlawful conduct.

The judge's reasoning also reflects the view that the increased earnings showed that the employees had not in fact suffered any losses as a result of the discriminatory schedule change. We do not agree with this reasoning. The amount of work that the Employer took away was relatively small, averaging less than an hour per day per employee, and is work that the unit could easily have absorbed. Even if individual employees'

<sup>&</sup>lt;sup>4</sup>Brown-Graves Lumber Co., 300 NLRB 640 (1990), enfd. 949 F.2d 194 (6th Cir. 1991).

<sup>&</sup>lt;sup>5</sup>NLRB Casehandling Manual (Part Three) Compliance Proceedings, sec. 10530.2(c).

actual earnings were higher than they were before the schedule change, there is no reason to believe that they could not have been even higher if the employees had been able to bid on the eliminated run. The Employer has the evidence of how much each discriminatee worked each day and what, if any, logistical problems they would have had in doing additional work, including work from the eliminated run. The Employer, however, has not introduced any evidence to show that even one of the discriminatees could not have performed this additional work. In any event, even if individual employees could not have performed the additional work, the work would have gone to other, less busy employees, and the Employer's total backpay liability would have been the same. In the alternative, if all the employees were too busy, then the Employer would have been forced to hire additional employees into the unit, and his total backpay still would have been the same. In sum, the Employer was in the best position to provide evidence that the employees would not have earned any additional amounts because of their workloads, and it has not introduced any such evidence. Finally, we resolve any uncertainty about this issue against the wrongdoing Respondent, whose unfair labor practice created it.6 For all these reasons, we find that the judge incorrectly amended the backpay specification. Accordingly, we do not adopt the judge's amendments to the backpay specification and find that backpay is to be calculated in accordance with the original specification.

## **ORDER**

The National Labor Relations Board orders that the Respondent, 88 Transit Lines, Inc., Charleroi, Pennsylvania, its officers, agents, successors, and assigns, shall make whole the employees named below by paying them the sum indicated, plus interest accrued to the date of payment, less the tax withholdings required by law. Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Discriminatee	Weeks	Weekly Loss	Net Backpay
Larry Boyd	115	4.04	464.60
David Carroll	7	4.04	28.28
Lou Cella	194	4.04	783.76
D. Danilchak	194	4.04	783.76
Lloyd Douglas	174	4.04	702.96
W. Dubarr	194	4.04	783.76
Robert Evans	194	4.04	783.76
Alphonso Guth	194	4.04	783.76
Reid Holub	194	4.04	783.76
Robert Kepics	110	4.04	444.40
G. Klochak	194	4.04	783.76
Russell Klose	194	4.04	783.76
K. Laskey	194	4.04	783.76
Clyde Parsons	127	4.04	513.08
Paul Phillips	194	4.04	783.76
Joseph Rapp	41	4.04	165.64
Gregory Smith	194	4.04	783.76
Roger Syme	55	4.04	222.20
T. Theakston	114	4.04	460.56
Herbert Wise	76	4.04	307.04
A. Capozzoli	53	4.04	214.12
J. Johnson	7	4.04	28.28
G. Lancaster	194	4.04	783.76
Warner	53.4	4.04	215.74
Vernet	8.2	4.04	33.13
Szedon	96.2	4.04	388.65
Livingston	1.8	4.04	7.27
Rothrauff	0.4	4.04	7.27
Schulz	54.2	4.04	218.97
Hoffman	51.6	4.04	208.46
Nomit	69.2	4.04	279.57
Marinos	47.6	4.04	192.30
Wyvrath	20.2	4.04	81.61
Bulna	56.8	4.04	229.47
Burnworth	24.0	4.04	96.96
Nedley	19.4	4.04	78.38
Leaver	18.0	4.04	72.72

Julie Rose Stern, Esq., for the General Counsel.

Bruce D. Bagley, Esq., of Harrisburg, Pennsylvania, for the Respondent.

Stephen H. Jordan, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

# SUPPLEMENTAL DECISION

HAROLD BERNARD JR., Administrative Law Judge. I heard this backpay case on January 21, 1993, in Pittsburgh, Pennsylvania, pursuant to a backpay specification and notice of hearing issued September 16, 1992, based on the Board's Decision and Order at 300 NLRB 177 dated September 28, 1990, later enforced by the United States Court of Appeals for the Third Circuit on June 26, 1991. (G.C. Exhs. 1a, b.)

<sup>&</sup>lt;sup>6</sup>Bridgeway Oldsmobile, 294 NLRB 858, 862 (1989); A & T Mfg. Co., 280 NLRB 916, 917 (1986).

The decision found, in relevant parts, that Respondent had changed its drivers' operating schedules as retaliation for the Union's success in the election, and further, unilaterally changed its policy relating to employee reimbursement for lodging expenses thereby respectively violating Section 8(a)(1), (3), and (5) of the Act. The remedy for the violation of Section 8(a)(5) of the Act was secured by the parties' settlement before me at the hearing and pursuant to counsel for the General Counsel's motion this matter was amended out of the specification.

The General Counsel also moved to amend the specification to reflect a corrected amount of backpay allegedly due 14 so-called replacement employees, discussed below, and I also granted this motion.

The Board's Order required Respondent to "make employees whole for any losses they may have suffered as a result of these unlawful actions . . ." under established guidelines. (G.C. Exh. 1a fn. 7, p. 9.) Given the withdrawal from the specification of the matter involving reimbursement expenses, there leaves the question of a proper make-whole remedy regarding the drivers' schedules change remaining for consideration.

#### I. BACKGROUND

On November 29, 1987, Respondent changed from a B schedule to a C driving schedule which caused or involved a realignment of its 15 different fixed bus driving scheduled routes, but did not directly change its way of operating its charter runs. All the drivers did both types of runs to varying degrees; in some instances driving a fixed route in the morning and a charter run that afternoon. The fixed schedule routes in some cases were reduced in size with an attendant enlargement in others. Number 14 run was, however, entirely discontinued, with all its driving hours, save for 2-3/4 hours, which were eliminated, being absorbed by other routes pursuant to the changed schedule. Respondent President Nones testified that run number 14 partly involved 2-3/4 hours paid dead time sitting at the terminal waiting to make the trip to California, Pennsylvania so it was his view that no actual physical work had been eliminated by the change. The parties nonetheless stipulated that after all the dust had settled, there were 2-3/4 hours less driving time on fixed scheduled routes available for unit employees after the unlawful change than before. Charter driving worktime remained the same. This circumstance continued until Respondent returned matters to the status quo ante on August 18, 1991, which then constitutes the ending date for the backpay period which therefore spans 1 month in 1987, all of 1988, 1989, 1990, and to August 18, 1991.

Regional Compliance Agent Clyde Graham with Respondent's cooperation during his extensive investigation into the 4-year-long period of employee records, was unable to trace the lost 2-3/4 hours to any single employee, core group of employees, or even a pattern consisting of any group of employees who could be identified as those who suffered losses from the reduction in hours after run 14 was eliminated. He could not find such a single employee because it had been a bid run that no longer existed past November 29, 1987. Further, all the fixed runs pre-ulp were up for bid every 4 months though some continuity of drivers in some runs seemed apparent to him; yet in the post-ulp period eight runs remained bid runs, but six lost bid status and Respondent as-

signed drivers to those runs daily, at its discretion. The wage rate for fixed runs remained the same \$6.75 per hour at all relevant times, but some routes are longer time-wise than others, yielding higher pay. The records contained the reports of income derived by unit employees from charters, as well, adding to the complexity in matters. There were three ways employees could get a charter, either from client requests by name, bidding, or by assignment from Respondent. If someone took a charter and their fixed transit run was vacant someone left on the "extra board" a list of unassigned drivers, could be assigned. Originally employee charter pay was based on the higher of mileage or an hourly rate; after August 12, 1990, Respondent used an hourly rate. Thus, there was a mix of different assignment and pay scenarios for the 23 drivers whose records came under scrutiny. When finished with the investigation it is undenied that the results showing many unimpaired if not improved employees' incomes after the unlawful change in scheduling led Graham to inform President Nones and an associate of Nones that, "as far as he was concerned we did not owe the drivers any money but the final decision was not his."

## II. ISSUANCE OF THE BACKPAY SPECIFICATION

Since no specific employee could be singled out and identified as having lost the 2-3/4 hours, the Region determined the loss should be distributed fairly among unit employees, Graham testified. Thus, based on a 5-day workweek with a daily loss of 2-3/4 hours, a weekly loss of 13-3/4 hours resulted, multiplied by the hourly rate of \$6.75 yielding \$92.81 divided among 23 drivers thereby each driver being entitled to \$4.04 per week for each week he remained in the unit during the backpay period. The resulting figure would represent each driver's backpay. For any new employees hired after the ulp as a replacement for departed unit employees the same formula would apply for the period he worked in the unit until the August 18, 1991 backpay period ended.

At the hearing Graham explained why the Board's established backpay formulas lacked applicability. The "replacement employee" model, for example, did not apply as no employee was terminated by the ulp. The "representative employee" formula by which an employee like the discriminatee job-wise continues doing the same work and thus his earnings are a good measure for backpay was not an available formula either. Finally, it was Graham's testimony that the average gross earnings or average gross hours models based upon a representative period prior to the ulp applied through the course of the backpay period as a base against which earnings in the period could be contrasted were simply invalid because in this case he averred, the loss of the 2-3/4 hours represented "a piece of the pie [that] was missing" which employees were not shown to have ever received.

When I asked the witness why he had not simply compared gross earnings of unit employees pre-ulp with such earnings post-ulp he did not hesitate to respond that it was because he agreed somewhat with Respondent's assertion in the course of compliance proceedings that a number of employees made more money during the backpay period. He cited also as a supporting reason that employees after the change may have made decisions they may not have made but for the change. Questioned further, Graham explained that the number of employees in the unit decreased during

the backpay period which could have accounted for larger earnings and that in any event none of the employees were paid for the 2-3/4 hours.

#### III. THE PARTIES' STIPULATION

With this background, the parties stipulated that,

During the backpay period and as a result of Respondent's implementation of the change in drivers' schedules to Schedule C, the bargaining unit employees as a group were scheduled for two-and-three quarter hours less of scheduled route work per week day than before the change totalling 13 and 3/4 hours for each week of the backpay period. These same employees, however, on an individual basis, did not necessarily experience lower gross earnings either annually or quarterly, and indeed many employees has [sic] higher gross earnings after the change to Schedule C than before the change was made. Gross earnings, as used in this stipulation includes earnings from scheduled routes as well as charter runs.

#### IV. CONTENTIONS OF THE PARTIES

Counsel for Respondent objects to the formula because it does not take into account the employees' backpay period earnings, a consideration which Graham acknowledged to be the usual procedure, and to Graham's rationale that the number of employees in the unit decreased so that individual earnings could naturally have been greater points out on brief that nine drivers left the payroll but 14 replacements were hired which militates against any decrease. (R. Exhs. 2, 4.) In this respect it is noted that neither Graham or the General Counsel supplied any probative evidence to support the view that the size of the unit decreased at times pertinent to assessing the significance to be given employee backpay period earnings. I asked Graham for the basis of his assertion that the unit had decreased in number of employees and he replied,

What I am telling you is I can't give you a specific number at any given time after that, but when I analyzed those records, I went through the records of who came in and when they were there. There was such a transient situation that I really can't give you a defined number other than at the time that they remedied the situation (August 18, 1991) there was less than the 23.

I conclude in this respect that there is no proof to support the alleged unreliability in using employees' backpay period earnings as a measure of their losses which can be attributed to a decrease in the size of the unit, when such has not been demonstrated

Respondent also contends the representative employee test or something akin to it could have been used because employee Phillips held run 14 for the year pre-ulp. Run 14 was entirely eliminated so there could be no representative employee to track earnings from post-ulp. Counsel further argues on brief that the formula uses a bludgeon-like approach, rather than ascertaining actual interim earnings if any, and that the approach taken is unprecedented in its ignoring of interim earnings entirely. Further, with regard to the backpay allegedly due replacement employees, Respondent counsel

asserts that such employees, not being present pre-ulp have nothing to be made whole for or restored to and therefore should be excluded from any backpay remedy.

To defend the formulas' approach, which focuses only on the reduction of 2-3/4 hours from the discontinued run 14 out of the 15 runs and the entire mix of combined fixed route and charter work—as well as ignoring all interim earnings, the General Counsel argued that the violation found was limited (for purposes of analysis herein) to such reduction only, which only affected fixed route schedule work opportunities. She argues the loss only impacted there, and not on the charter driving work, so that interim earnings are irrelevant insofar as drivers earned income from such other source. Further, she notes nonbinding comment in the Board's compliance manual that the discriminatee is not obliged to work overtime to reduce a respondent's backpay obligation par. 10604.3, and that the formula was accurate, reasonable and proper. She argued that "Graham found it extremely difficult, if not impossible, to determine with any accuracy what pre-change earnings or hours of work should be used for a comparison." (G.C. Br. 6.) Turning to charter runs, she further noted the absence of data showing how many hours were required to be worked to achieve the earnings from such work and contended such income would not be relevant anyway because the change did not affect charter work. To support her inclusion of replacement employees in the remedy General Counsel points out that the Board's Order did not expressly delimit the term employees from the remedial portion on the decision to only those employed at the time of the ulp.

## V. ANALYSIS

The General Counsel had to prove that the formula used to determine gross backpay was "reasonable under the circumstances." Rikal West, Inc., 274 NLRB 1136, 1137 (1985). The formula in this case could not reach the exact correct figures here due to a host of dynamics in assignment and pay systems which could change daily but, so long as it was reasonable and had a legal basis, this was all that was required, for there is considerable discretion in selecting, "a methodology which is reasonably designed to approximate the amount of backpay a wrongfully discharged employee would have received absent the employer's wrongful conduct," and (if such is the case) "General Counsel's computation of gross backpay, in the absence of preponderant contrary evidence, meets the legal standards of permissible discretion in determining approximate gross backpay." Churchill's Supermarkets, 301 NLRB 722 (1991), citing Rikal West, Inc., supra at 1138, and NLRB v. Carpenters Local 180, 433 F.2d 934 (9th Cir. 1970); and Iron Workers Local 378 (Judson Steel), 262 NLRB 421 (1982).

The Board's decision in the case underlying that before me rested on the loss of 2-3/4 hours which could not be traced specifically, and did not lend itself to any of the four usual formulas in the Region's judgment, leaving available under established policies any formula reasonable and proper and which would be the most accurate available on which to make the gross backpay calculation. For "it is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed [case cited] and that in a backpay proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due. . . Once that

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is established, 'the burden is upon the employer to establish facts that would mitigate that liability.'' Hacienda Hotel & Casino, 279 NLRB 601, 603 (1986), and cases cited. Any uncertainty in such situations is resolved against the Respondent who is considered a wrongdoer responsible for such uncertainty who therefore bears responsibility, rather than the wronged against employees. Churchill's Supermarkets, supra at 725, and Hacienda Hotel & Casino, supra at 603.

Saying this, it is important to note, as well, Board law cautioning against the use of speculation, since a "backpay remedy must be sufficiently tailored to expunge only the actual and not merely speculative consequences of the unfair labor practices." *Georgia Kraft Co.*, 288 NLRB 29 (1988), citing *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984). The Board furthermore, eschews the use of a formula wherein employees not entitled to backpay receive an undeserved windfall. *Ogle Protection Service*, 183 NLRB 682, 683 (1970).

The responsibility rests here to determine the propriety of the General Counsel's formula and to make a recommendation to the Board concerning the most accurate method of determining backpay. *American Mfg. Co.*, 167 NLRB 520 (1967). Applying the above principles I conclude General Counsel's formula, insofar as it represents an effort to ascertain gross backpay for the 23 employees working at the time of the ulp is within the considerable, permissible discretion afforded in such preparation, as far as it goes. However, in my view it doesn't go far enough, because I do not agree that there is a valid reason for entirely ignoring employees' documented earnings during the backpay period due to alleged irrelevancy, especially when the records thereof show substantially larger amounts of pay over employee earnings for the base pre-ulp period. Yet this is what the computation does.

The Board's Order required the customary make-whole remedy on employees' behalf for any losses they may have suffered from Respondent's action. Making whole, as the Board's Compliance Manual states, "involves payment to the discriminatee of a sum equal to gross backpay (what the discriminatee would have earned in employment lost through discrimination) less net interim earnings (what was actually earned from other employment during the period less expenses incurred in seeking and holding interim employment),

the *difference* between the two being the net backpay due." Supra, par. 10530. (Emphasis added.) The use of interim earnings is based upon a concept that is a cornerstone principle in backpay proceedings, applied over the years as a necessary adjunct for determining back pay. No authority is advanced to support the unprecedented rejection of it here, nor is there any justification for its being ignored based upon the facts.

The General Counsel's argument that the employees' total earnings post-ulp included both fixed and charter runs and could not be considered as interim earnings because the Respondent's change of schedules directly involved only the fixed run schedule and not the charter runs is transparently invalid. Employees enjoyed an amorphous, ever-changing mix or environment of opportunities for work at Respondent's operation. There is no reason why their post-ulp earnings from the same work environment or mix should not be used to offset or mitigate losses from the tiny fraction of lost hours in one of the components in such mix, either in law or logic. Her citation from the nonbinding Compliance Manual of the policy against employees being "obligated" to work overtime in order to mitigate losses is without merit as no employee was shown to have been required to do sonor was a contention even made of such. Moreover, overtime was a very common other component in the employees' preulp mix of job or work or pay opportunities so there was nothing different bout overtime during the post-ulp period such as would disqualify pay from the comparatively little overtime involved it should be noted, from being considered interim earnings. (R. Exh. 2.) Her final argument that the post-ulp wages could have involved more working hours due to longer charter lacks legal significance because such driving work was not forced on any employee and was an equivalent task to what all unit bus drivers had been performing in both pre and post ulp periods of time so that it would be entirely appropriate to use for backpay purposes.

At the hearing Respondent offered records showing employee earnings from all sources and work at its operations for the 23 original unit employees from the one year pre-ulp period ending November 27, 1987, through August 18, 1991, the entire backpay period, broken down into pay periods (every 2 weeks); and including yearly totals. The General Counsel, given the opportunity to examine the records and having done so stated she had no objection to the records' authenticity, but objected to their admission on the ground they were not relevant because employees, absent the change in route scheduling, may have earned more than as set forth in the records. This objection being wholly speculative, and the Respondent's authentic records being very much relevant to its burden of proving any mitigation of gross backpay arising from interim earnings, the records were received into evidence. Having concluded that interim earnings may constitute proper mitigation in this case, the examination of employee records for the 5 years in question examined into a comparison of the base pre-ulp total earnings in the year before the ulp with each of the yearly following periods until August 1991, the goal being to determine what net losses or net backpay, if any, would be due under the General Counsel's formula herein found, save for its unwarranted omission of any consideration of interim earnings, to otherwise constitute a reasonable and helpful model.

<sup>&</sup>lt;sup>1</sup> The 14 so-called replacement employees were all hired post-ulp and Compliance Agent Graham noted "a very transient operation [in the backpay period], there were people that came in and out for short periods of time." The records show moreover, a wide range in their tenure, from less than a week to widely varying periods of time. Unlike the original core group employees pre-ulp, the replacement employees' sporadic employment only post-ulp cannot be contrasted with pre-ulp earnings to determine interim earnings. Further, such employees have no losses to be restored to them, since they were not employed at the time of the elimination of run 14. See Systems Management, Inc. v. NLRB, 901 F.2d 297, 308-309 (3d Cir. 1990). While I have otherwise concluded (except for the omission of interim earnings from the calculation of backpay due the 23 employees working pre-ulp) that the formula reasonably approximates gross backpay due employees, I find that the transitory replacement employees are not includable therein, or in any other formula, for backpay purposes, under the Board's Order. The specification is hereby further amended therefore, to exclude them from coverage, as any determination of such matter would be unduly speculative. Georgia Kraft Co., supra; and Sure Tan, Inc. v. NLRB, supra.

## VI. AMENDMENT TO SPECIFICATION

Consistent with these findings I shall amend the specification to reflect net backpay due employee after deductions for interim earnings reflected by Respondent's records. For this purpose, and due to the ebb and flow of earnings, which naturally occurred in the unique milieu of their mixed assignments, I conclude that the most reliable periods to use are the yearly earnings totals in each of the years post-ulp, 1988, 1989, 1990, and 1991 (up until August 18, 1991, the end in the backpay period). See NLRB Casehandling Manual (Part Three) Compliance, section 10532.1. These yearly wage totals are compared with the pre-ulp base period year earnings. When any post-ulp year's total wages equal or exceed the base period year, and thus interim earnings mitigated any gross back pay for such year, an amount equal to General Counsel's formula figure of \$4.04 per week times the number of weeks in the work year as set forth in the original formula is deducted from gross backpay. (G.C. Exh. 1c, par. 12.) Where the Respondent's records do not prove any mitigation, such as where merely unexplained absences are shown, and where the record evidence fails to support willful loss of earnings (employee Wise's case), I have concluded Respondent has not carried its burden of proving a diminution in backpay as set forth in the specification, which I have found except as noted above, to yield a reasonable approximation of the backpay due. The following shows the original specification amounts due each employee first, and the basis for such; then the amount of interim earnings yielded by the records and as translated under the original specification is set forth; the computation of net backpay under the amendment to the specification is then shown.

Employee		
Boyd		
115 weeks x \$4.04 =		\$463.45
less 1987 (11/29–11/26/88) 52 x \$4.04		210.08
	Net Backpay	\$253.37
Carroll		
No mitigation proven	Net Backpay	\$28.28
Cella		0500.5
194 weeks x \$4.04 =		\$783.76
less 1989 and 1990 104 x \$4.04		420.16
	Net Backpay	\$363.60
Danilchak		
194 weeks $x $4.04 =$		\$783.76
less 1989 and 1990 104 x \$4.04		420.16
	Net Backpay	\$363.60
Douglas		4505.00
174 weeks x \$4.04 =		\$707.00
less 1988 and 1989 104 x \$4.04		420.00
	Net Backpay	\$287.00
Dubarr		
No mitigation proven	Net Backpay	\$783.76

Employee		
Evans		
194 weeks x \$4.04 = less 1989 and 1990 104 x \$4.04		\$783.76 420.16
	Net Backpay	\$363.60
Alphonso Guth 194 weeks x \$4.04 = less 1988 and 1990 104 x \$4.04		\$783.76 420.16
	Net Backpay	\$363.60
<i>Holub</i> 194 weeks x \$4.04 = less 1988 52 x \$4.04		\$783.76 210.08
	Net Backpay	\$573.68
<i>Kepics</i> 110 weeks x \$4.04 = less 1989 52 x \$4.04		\$444.40 210.08
	Net Backpay	\$234.32
Klochak 194 weeks x \$4.04 = less 1988 and 1990 104 x \$4.04		\$783.76 420.16
	Net Backpay	\$363.60
Klose		
194 weeks x \$4.04 = less 1988, 1989, and 1990 156 x \$4.04		\$783.76 630.24
	Net Backpay	\$153.52
Laskey No mitigation proven	Net Backpay	\$783.76
Parsons No mitigation proven	Net Backpay	\$513.08
Phillips 194 weeks x \$4.04 = This employee's base period earni \$17,613.02 but, to avoid a distortion comparison with later earnings during from his being on furlough 12–20–8t erage of his earnings in other quar was projected, leaving a constructed t less 1988, 1989, and 1990 156 x \$4.04	in his base period the Backpay perion through 13–28–8 ters during the ba	s use as a dod arising 86, the av- ase period
	Net Backpay	\$153.52
Rapp No mitigation proven	Net Backpay	\$165.64
Smith 194 weeks x \$4.04 = less 1988, 1989, and 1990 156 x \$4.04		\$783.76 630.24
	Net Backpay	\$153.52
Syme 55 weeks x \$4.04 = This employee's adjusted base perior \$16,977.88 warranted to avoid a dist being employed for 2 and a fraction of No mitigation proven	ortion arising from	n his only

Employee		
114 weeks x \$4.04 = less 1988 and 1989 104 x \$4.04		\$460.56 420.16
	Net Backpay	\$40.40
Wise No mitigation proven	Net Backpay	\$307.04
Cappozoli No mitigation proven	Net Backpay	\$214.12
Johnston No mitigation proven	Net Backpay	\$28.28

	\$783.76
	210.08
Net Backpay	\$573.68
	Net Backpay

the amended net backpay due employees is \$7,287.17 plus terest as prescribed in *New Horizons for the Retarded*, 283 LRB 1173 (1987).

[Recommended Order omitted from publication.]